REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 239 OF 2009

KENNEDY OUMA…….....
……..APPELLANT
-VERSUS-

REPUBLIC…….....
.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Resident Magistrate's court at Ndhiwa Criminal case no. 157 of 2009 by Z.J.Nyakundi-RM)

The appellant **Kenndey Ouma Osiany**, was charged before the Resident Magistrate's court at Ndhiwa with the offence of defilement contrary to section 8(3) of the **Sexual Offences Act .** The particulars stated in the charge sheet were that on the 20th November, 2006 at West Kochieng sub-location in Ndhiwa District within Nyanza province he caused his penis to penetrate the vagina of **B.A.M** a child aged twelve years. The appellant too faced an alternative count of indecent act with a child contrary to section 11 of the **Sexual offences Act.** The particulars given were that on same date and place he committed an indecent act with **B.A.M** a child aged twelve years by rubbing his penis against her vagina.

The appellant denied both charges and he was tried in earnest. The prosecution called a total of six witnesses in a bid to prove its case against the appellant. In summary the evidence led by the prosecution was that on 20th November, 2006 at around 5 p.m the complainant (PW1) was sent to the shamba by her mother to scare away the monkeys which were destroying their crops. As she went about her duty the appellant suddenly emerged, held her by hand and pulled her to the centre of the shamba. When she tried to resist by raising an alarm the appellant held her neck and threw her to the ground and forcefully removed her pants and then defiled her. When done he ran away. The complainant collected herself and went back home and immediately informed her mother, sister, **P.O.N** (PW3) and brother **L.O.M** (PW4) on what had transpired.

PW3 in her testimony stated that on the 26th November, 2006 at around 6 p.m PW1 arrived home crying, her mouth swollen and had blood stains on her legs. When they asked her whether she had been beaten by a snake she answered in the negative and informed them that it was infact the appellant who had sexually assaulted her. The trio then took her to Homa-Bay District hospital where she was treated. Prior to that they had reported the incident to Ndhiwa police station and had been issued with a P3 form. She was subsequently examined by a clinical officer, **Alice Nimbai** (PW6) who filled the P3 form on 28th November, 2006. It was her opinion that PW1 had been defiled and or raped as she had a perforated hymen with hyperemic vaginal wall.

In the meantime the appellant, was a person well known to the family of the complainant as he was a nephew to a wife married in that family and used to reside thereat. He suddenly disappeared from the

precincts soon after the incident. Sometimes later, PW4 met him riding a bicycle. That was on 14th May, 2009 as he headed to his uncles place. He stopped him and demanded that they go to the chief failing which he would raise an alarm. The appellant obliged. He was thereafter handed over to **Samson Amollo Owit** (PW2), the Assistant chief for West Kochieng who escorted him to the police station and handed him over to **P.C. Kiptum** (PW5). PW5 interrogated him and thereafter arraigned him in court on the instant charges.

Put on defence the appellant chose to make unsworn statement and called no witnesses. He testified that he could not recall the events of 20th November, 2006 but could only recall the events of the day of his arrest being 14th May, 2009. He stated that he was arrested and assaulted while he was on his way to Kabuoch from Ndhiwa by PW4. He further stated that when he inquired from him as to why he was being arrested and assaulted, he was told that he will be informed later. He was then taken to the assistant chief who in turn escorted him to the police station and he was later arraigned in court. He maintained that he knew nothing about the offence.

The learned magistrate having carefully evaluated the evidence tendered by the prosecution as well as the defence came to the finding that the prosecution had proved its case beyond reasonable doubt as required by law. He thus convicted the appellant as charged on the main count. Thereafter the learned magistrate correctly made no findings on the alternative charge. Upon conviction as a foresaid, the learned magistrate sentenced the appellant to twenty (20) years imprisonment.

That conviction and sentence triggered this appeal. In a three point home made petition of appeal, the appellant impugned the conviction and sentence aforesaid on the grounds that he had been detained in the police station in excess of 24 hours before he was arraigned in court. Accordingly his constitutional rights had been violated. Secondly, he had been in remand custody during his entire trial which lasted seven (7) months and finally he pleaded with this court for a pardon.

When the appeal came up for hearing before me on 27th May, 2010 **Mr. Gitonga,** the learned state counsel conceded to the same on the ground that the charge sheet as framed did not contain the penalty section as required. The appellant was thereby prejudiced in his trial. He however sought a retrial in the event that this court agreed with him and allowed the appeal. He supported his plea for a retrial on the grounds that the evidence against the appellant was simply overwhelming. The appellant had only been convicted and sentenced on 19th November, 2009 and had therefore hardly served the sentence. In any event he had been sentenced to 20 years imprisonment. Finally he submitted that the witnesses were readily available.

The appellant was not a verse to the idea of a retrial. No doubt the appellant was charged with a serious offence whose sentence upon conviction was a minimum of twenty (20) years imprisonment. In such cases, it is incumbent upon those drafting charges to be careful. They should not commit an omission that my turn out to be prejudicial to the appellant. It is also incumbent upon the magistrate before admitting or accepting a charge sheet to be satisfied that it meets all the requirements of the law. The charge sheet herein did not include the penalty section. I deally the charge sheet should have been brought under both sections 8(1) and (3) of the Sexual Offences Act. Whereas section 8(1) deals with the offence charged, subsection (3) deals with the penalty. That section provides that person who commits the offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. This is where the appellant's case fell. Thus failure to mention the penalty section no doubt prejudiced the appellant. He was certainly not made aware of the seriousness of the offence. Perhaps, had he known he may have sought the services of lawyer.

However are these omissions curable under section 382 of the **Criminal Procedure Code.** The answer appears to be yes and no. The section provides that a conviction and sentence by a competent court shall not be open to challenge on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceeding unless the error, omission or irregularity has occasioned failure of justice. In my view the omission aforesaid occasioned a failure of

justice in this case. It is also instructive that in determining whether an error, omission or irregularity has occasioned a failure of justice the court must have regard to the question whether the objection should have been raised at an earlier stage in the proceedings. The appellant herein was a layman. I would want to assume that he does not know the intricacies of law. Had he been represented by a lawyer then, I would have had absolutely no difficulties or hesitation in holding in the light of this proviso that indeed the omissions were curable for his counsel would have noted the omission and raised it at the trial. However this is not the case here. The appellant being a layman cannot therefore be blamed for the failure to raise the issue early enough.

Whether or not a retrial should be ordered must of course, depend on the particular facts and circumstances of each case. But it will only be made where the interest of justice require. See **Benard Lolimo Ekimat, .v. Republic (2005) I KLR .** In this case the appellant is not opposed to the order for retrial. I am satisfied that justice will be best served if such an order was made. Afterall, the appellant was only convicted and sentenced on 19th November 2009. That was only last year. He has thus not been in prison custody for long. He cannot therefore claim prejudice if such an order is made. In any case he had been sentenced to twenty (20) years imprisonment. The evidence against him was simply overwhelming. If the self-same evidence was tendered, I am satisfied that a conviction is most probable.

In the result, I order a retrial in this case. For that purpose, the appellant shall be presented before the Senior Resident Magistrate's Court at Rongo on 9th July, 2010 for his retrial to commence. He cannot be retried in the Resident Magistrate's Court at Ndhiwa, since there is only one magistrate who in any event presided over his initial trial. Until then the appellant shall remain in prison custody

Judgment dated, signed and delivered at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA
JUDGE